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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID AGUILERA,

Defendant and Appellant.

D059937

(Super. Ct. No. RIF149652)

APPEAL from a judgment of the Superior Court of Riverside County, Richard A. Erwood, Judge. Reversed.

A jury convicted David Aguilera of resisting an executive officer (Pen. Code,¹ § 69). It acquitted him of assault with a deadly weapon other than a firearm (§ 245, subd. (a)(1)) and possession of a controlled substance and paraphernalia by a state prisoner (§§ 4573.6, 4573.8).

¹ All statutory references are to the Penal Code unless otherwise stated.

In bifurcated proceedings, Aguilera admitted two prison priors (§ 667.5, subd. (b)) and three prior strike convictions (§§ 667, subds. (c) and (e)(2)(A), 1120.12, subd. (c)(2)(A)). The court sentenced Aguilera to three years and four months in state prison.

Aguilera contends there was insufficient evidence to support the conviction, and the trial court erroneously refused to instruct the jury on a lesser included offense. We conclude sufficient evidence supported the conviction, but the trial court committed prejudicial instructional error as to section 148, subdivision (a)(1) being a lesser included offense of section 69. Accordingly, we reverse.

BACKGROUND

Prosecution Case

On September 12, 2008, Correctional Officer Manuel Camargo was on duty and checking rooms at the Rehabilitation Center in Norco, California. He was dressed in uniform, which included a stab vest, pepper spray, a baton, cuffs and a personal alarm. Aguilera was in his room, but his body was concealed by an open locker door. Knowing that inmates sometimes hide from the officers in that way, Officer Camargo asked Aguilera what he was doing. Aguilera did not respond; therefore, Officer Camargo ordered him to leave the room with his hands empty. Aguilera defied the order, sat on his bed with a notebook in his hands and said, "Come on Camargo. Come on Camargo." Officer Camargo repeated the order, and Aguilera stood up with the notebook in his hand. Officer Camargo ordered him to drop the notebook. As Aguilera was complying, Officer Camargo saw a makeshift syringe containing a brown substance, which appeared to be heroin, fall on top of Aguilera's mattress. Aguilera immediately picked up the syringe

and approached Officer Camargo, repeating, "Come on Camargo. Come on Camargo." Officer Camargo yelled, "Get down, get down, get down." Aguilera appeared to have an "evil-type look on his face," and thrust the syringe towards Officer Camargo about two or three times. The needle reached about six to twelve inches from Officer Camargo, who backed out of the room and into the hallway for fear of being injected with the syringe and contracting a communicable disease. Officer Camargo pressed his alarm to summon assistance, drew his baton, and again ordered Aguilera to get down. In the hallway, Aguilera stretched out his hands and stepped to his right. Someone in the adjacent room grabbed the syringe from Aguilera's right hand. Afterwards, Aguilera lay on his stomach in the hallway.

Officer Camargo found a syringe containing a brown substance, which tested positive for heroin, underneath the mattress of Philip Marin, the inmate in the room adjacent to Aguilera's.

At the end of the prosecution's case-in-chief, the defense moved for dismissal under section 1118.1. The trial court denied the motion, ruling that sufficient evidence showed Aguilera refused to comply with Officer Camargo's orders, and thrust the syringe at him.

Defense Case

Aguilera admitted that when Officer Camargo came to his room, he was hiding behind his locker door, but claimed he was holding a contraband cell phone chip for another inmate. Aguilera claimed that while lying on the floor, he slid the chip down the hallway when Officer Camargo was not looking. Aguilera denied threatening or getting

close to Officer Camargo, attempting to assault him, having a syringe, or giving anything to Marin.

In proceedings outside of the presence of the jury, Aguilera requested a jury instruction stating that section 148 may be a lesser included offense of the crime of resisting an executive officer in the performance of duty. Concluding the CALCRIM No. 2652 use notes prohibit such an instruction, the trial court denied the request.

The jury requested and received a read back of Officer Camargo's and Aguilera's testimony, which provided notably different descriptions of the incident. The jury also asked the trial court to clarify, "What is the exact meaning of 'force' or 'violence' in regards to Count 4 (as defined by Judge)?" The court referred the jury to CALCRIM No. 200, which states in relevant part, "Some words or phrases used during this trial have legal meanings that are different from their meanings in everyday use. These words and phrases will be specifically defined in these instructions. Please be sure to listen carefully and follow the definitions that I give you. Words and phrases not specifically defined in these instructions are to be applied using their ordinary, everyday meanings."

One day before the jury finished deliberating, it had determined that Aguilera was not guilty of the charge of resisting arrest, and recorded that decision on a verdict form. However, following more deliberations, and after receiving the court's response to its inquiries, the jury changed the verdict form and instead convicted Aguilera.

DISCUSSION

I.

Aguilera challenges the sufficiency of the evidence to support the resisting arrest charge, pointing out that although Officer Camargo testified Aguilera thrust a syringe at him, the jury acquitted Aguilera of assault and possession of both paraphernalia (a syringe) and a controlled substance.

Section 69 provides: "Every person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law, or who knowingly resists, by the use of force or violence, such officer, in the performance of his duty, is punishable by a fine not exceeding ten thousand dollars (\$10,000), or by imprisonment pursuant to subdivision (h) of Section 1170, or in a county jail not exceeding one year, or by both such fine and imprisonment." The California Supreme Court has noted, "The statute sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty." (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.) Because Aguilera was convicted only of resisting arrest, we are concerned here only with the second type of offense under section 69.

The standard of review for a sufficiency of the evidence claim is well settled. We must determine " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " [Citations.] We examine the record to determine "whether

it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' ' ' ' (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) The uncorroborated testimony of a single witness is sufficient to support a conviction unless the testimony is physically impossible or inherently improbable. (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 845, citing *People v. Scott* (1978) 21 Cal.3d 284, 296.)

Aguilera does not dispute that he knew Officer Camargo was performing his lawful duty. Rather, the point of contention is whether sufficient evidence supports the jury's finding that Aguilera used force to resist Officer Camargo. We conclude that although the issue is close, Officer Camargo's testimony that Aguilera, with an "evil" look on his face, made two or three thrusting motions towards him, at a close distance, using a syringe, sufficed to support the charge.

The California Supreme Court in another context has stated: "By definition, 'force' involves "power, violence, compulsion, or constraint exerted upon or against a person." (*People v. Modiri* (2006) 39 Cal.4th 481, 494.) "Violence" has been defined as, "exertion of any physical force so as to injure or abuse." (Webster's 3rd New Internat. Dict. (1961) p. 2554.) Under these definitions, Aguilera's actions in the correctional facility constituted force or violence, because he exerted physical force so as to injure Officer Camargo.

The jury here reasonably could have believed that even if Aguilera did not possess the syringe or controlled substance, he resisted arrest by declining to comply with Officer Camargo's orders and making thrusting movements while holding some object in his hand. The jury was instructed with CALCRIM No. 226 that it was entitled to believe "all, part, or none of any witness's testimony." Officer Camargo's response of backing out of the room and pressing his alarm for help supports the inference Aguilera used force. Further, the jury, despite its questions and doubts about the testimony, concluded it sufficed to convict Aguilera beyond a reasonable doubt. We also note Officer Camargo's testimony was not physically impossible or inherently improbable, and the trial court credited it in denying Aguilera's motion to dismiss.

II.

We agree with Aguilera's contention that the trial court prejudicially erred in not granting his request to instruct the jury that section 148, subdivision (a)(1) is a lesser included offense of section 69. Error in failing to instruct on a lesser included offense is

reviewed under the standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Breverman* (1998) 19 Cal.4th 142, 177–178 (*Breverman*).)

Section 148, subdivision (a)(1) states: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, shall be punished by a fine not exceeding one thousand dollars (\$1000), or by imprisonment in a county jail not to exceed one year, or by both that fine and imprisonment."

The CALCRIM No. 2652 use notes state: "Penal Code section 148(a) may be a lesser included offense of this crime, see *People v. Lacefield* (2007) 157 Cal.App.4th 249, 259, which found that the trial court had a *sua sponte* duty to instruct on the lesser included offense defined by [] section 148(a)(1), disagreeing with *People v. Belmares* (2003) 106 Cal.App.4th 19, 26 and *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532." The trial court here nonetheless apparently misread the use notes when it ruled the instruction could not be given. In fact, the court was not barred from instructing that section 148, subdivision (a)(1) is a lesser included offense of section 69.

The accusatory pleading here alleged both types of offenses in section 69: "[Aguilera] did willfully and unlawfully attempt by means of threats and violence to deter and prevent [Camargo], who was then and there an executive officer, from performing a duty imposed upon such officer by law, and did knowingly resist by the use of force and violence said executive officer in the performance of his duty." But at trial the court declined to instruct regarding the threat prong of section 69, ruling, "I don't think, 'Camargo, come on, Camargo,' necessarily is . . . a threat. [Aguilera's] just basically

saying, 'Hey, cut me some slack. Leave me alone. I'm not doing anything wrong,' that sort of thing." Consequently, the prosecutor expressly relied on the second type of offense, based on appellant's use of force.

The court instructed the jury with CALCRIM No. 2652, which sets forth the elements of the section 69 offense at issue here as: "1. The defendant unlawfully used force or violence to resist an executive officer; [¶] 2. When the defendant acted, the officer was performing his lawful duty; [¶] AND [¶] 3. When the defendant acted, he knew the executive officer was performing his duty." The jury was further instructed that the correctional officer was an executive officer for purposes of the crime.

A trial court must instruct the jury sua sponte on all theories of a lesser included offense when substantial evidence supports a finding that the defendant committed that lesser offense but not the greater charged offense. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *Breverman, supra*, 19 Cal.4th at p. 162; *People v. Barton* (1995) 12 Cal.4th 186, 195.)

We agree with the holding that section 148, subdivision (a)(1) is a lesser included offense of section 69. (*People v. Lacefield, supra*, 157 Cal.App.4th at p. 259.)

Accordingly, we conclude the trial court erred in failing to so instruct because an evidentiary basis for that instruction existed. Further, the error was not harmless because this is not a case in which the evidence of guilt was uncontested or overwhelming. Each side presented different, plausible versions of the incident.

In light of the jury's question regarding the definition of "force" and "violence," requests for testimony read back, and change of verdict, we conclude that it is reasonably

probable that with proper instruction the jury would have convicted Aguilera of the lesser included crime under section 148, subdivision (a)(1).

The People rely on *People v. Carrasco* (2008) 163 Cal.App.4th 978 for their contention that no instructional error occurred because "the jury could only have concluded that [Aguilera] either did not resist or had resisted Officer Camargo with force. Accordingly, there was no substantial evidence to warrant an instruction on the lesser included offense of misdemeanor resistance."

But *People v. Carrasco, supra*, is distinguishable on its facts, which we set forth in detail: "Appellant had to be physically taken to the ground by Detective McGuffin because he refused to comply with Deputy Macias's repeated orders to remove his hand from his duffle bag. Appellant failed to comply with several officers' repeated orders to relax and Macias's orders to 'stop resisting.' He continued to struggle with Macias and McGuffin, as well as several other officers. Macias attempted to control appellant's torso, while three other detectives attempted to control appellant's arms. Appellant placed his hands and arms underneath his body, was 'yelling, kicking, [and] cussing,' and said he would 'kick [the officers'] ass[es].' Appellant continued to squirm and refused to give his right hand to Macias. Appellant did not comply until after Lieutenant Rothans administered the use of pepper spray. There was no contrary evidence disputing the officer's description of the struggle on the floor." (*Id.* at pp. 985-986.) As noted, Aguilera used substantially less force; therefore, we cannot apply the reasoning in *Carrasco* to the facts here.

DISPOSITION

The judgment is reversed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.